Supreme Court, U.S.
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No. 00-705

In The

Supreme Court of the United States

MANJIT S. KANG,

Petitioner,

versus

STATE OF LOUISIANA and LOUISIANA STATE UNIVERSITY DEPARTMENT OF AGRONOMY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATUTES

42 U.S.C. § 2000e-3(a) ..... *passim*

STATEMENT OF THE CASE

Petitioner herein has accurately summarized the procedural history of this case. Likewise, he has correctly pointed out that this Court has jurisdiction in this matter. He has also fairly stated the issues on which the parties herein disagree. Although he has, not surprisingly, emphasized those facts which are favorable to him, he has, nevertheless, adequately summarized the information which this Court needs to know about this litigation. Additional relevant facts regarding the comparison of petitioner's qualifications to those of the candidate originally selected, are concisely presented in the Magistrate Judge's Report and Recommendation which was relied upon by both the district court and the court of appeals.

Suffice it to say, then, that The Board of Supervisors of Louisiana State University and Agricultural and Mechanical College ("LSU")[1] denies that petitioner was the victim of either discrimination or retaliation. In fact, those LSU employees who are alleged to have discriminated and then retaliated against petitioner vehemently deny those charges.

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[1] Since petitioner occasionally uses the plural to refer to LSU ("defendants"or "respondents"), it should be noted that LSU is the only defendant in this case. The State of Louisiana and the LSU Department of Agronomy were dismissed in the district court.

SUMMARY OF ARGUMENT

In his first assignment of error, petitioner suggests that the Fifth Circuit misinterpreted the Civil Rights Act of 1964 by requiring a showing that he was subjected to an "ultimate employment action" in order to have a claim for retaliation. He further contends that the Fifth Circuit's standard on this point is in conflict with that used by other circuits. LSU respectfully submits that petitioner's application for certiorari should be denied because the conflict between the circuits which he relies upon does not rise to the level of importance required for this Court to resolve it since it appears that all of the lower courts are, essentially, reaching the same result, though by different means. LSU points out that this Court has previously declined requests to resolve this "conflict" and submits that there is no reason for it to do so now.

The essence of petitioner's second assignment of error is that the courts below failed to find that he was more qualified than the candidate who was selected. LSU respectfully submits that the standard by which petitioner's qualifications were evaluated is consistent with that called for by this Court. As such, there was no error and certainly no reason for this Court to grant his petition for writ of certiorari.

ARGUMENT

MAY IT PLEASE THE COURT:

***Assignment of Error Number 1*: The Court of Appeals Deprived Petitioner, Manjit S. Kang, Of Rights Afforded By The Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) By Narrowing the Applications of Sections 703(a)(1) and 704(a) by Relying on Two Judge Made Terms, "Adverse Employment Action" and "Ultimate Employment Decisions"**

Petitioner's retaliation claim in this case was dismissed by the courts below in reliance upon a case decided some three years ago, *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 336 (1997). In that case, the Fifth Circuit held that Congress only intended to protect from retaliation those who are subjected to "ultimate employment decisions." The petitioner in this case has not even alleged that he suffered any ultimate employment action.[2] Respondent respectfully submits that the approach taken by the Fifth Circuit, although somewhat different from that adopted by several other circuits does not present an ***important*** conflict, within the meaning of Rule 10 of the Rules of the

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[2] According to petitioner, he was the victim of retaliation in five different ways: (1) various faculty members deliberately attempted to annoy, harass and intimidate him, such as some of the other professors not speaking to him, one following him in the parking lot on one or perhaps several occasions and several coughing and/or making other noises when around him; (2) denial of a request for professional leave and travel reimbursement; (3) receipt of a poor job evaluation; (4) refusal to pay for certain publication costs in connection with a book he had edited (except out of research funds allocated to him); and (5) other similar events ("minor charges and major hassles").

Supreme Court, because this conflict was known at the time when the Fifth Circuit announced its position and this Court denied writs in that very case. See *Mattern v. Eastman Kodak Co.*, 104 F.3d 702 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 336 (1997). Moreover, this Court has declined to take up numerous other cases where actions less than "ultimate employment decisions" were found to be outside of the scope of protection of the Civil Rights Act of 1964.[3]

The conclusion that the difference between the approach adopted by the Fifth Circuit is not an ***important*** conflict with that approach used by several other circuits

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[3] See, e.g., *Hill v. Mississippi State Employment Service*, 918 F.2d 1233 (5th Cir. 1990), *cert. denied*, 502 U.S. 864 (1991) (retaliation claim rejected because based only upon allegations that co-workers stared at plaintiff, followed her, prolonged the time she had to wait for disbursement checks, relegated her file to a less desirable classification, deleted evidence of work experience from a reference form and criticized her for filing an EEO charge); *DeAngelis v. El Paso Mun. Police Officers Assn.*, 51 F.3d 591 (5th Cir. 1995), *cert. denied*, 116 S. Ct. 473 (1995) (jury verdict overturned where employee's complaint of retaliation was based solely on derogatory comments by fellow employees); *Whitaker v. Carney*, 778 F.2d 216, 221 (5th Cir. 1985), *cert. denied*, 479 U.S. 813 (1986) (Title VII held not to protect an employee from harassment outside the workplace by non-employees); *Landgraf v. USI Film Products*, 968 F.2d 427, 431 (5th Cir. 1992), *affirmed*, 511 U.S. 244 (1994) (refusal of co-employees to speak to plaintiff held not to constitute retaliation). See also *Robinson v. City of Pittsburgh*, 120 F.3d 1286 (3rd Cir. 1997) ("anger, irritation, dirty looks, even the silent treatment, can cause distress" but do not rise to the level of an adverse employment action) and *Smart v. Ball State University*, 89 F.3d 437, 441 (7th Cir. 1996) (receipt of a negative performance review does not constitute retaliation).

becomes especially clear when one understands that petitioner herein has overstated the difference in these approaches. Petitioner would have this Court believe that some circuits have concluded that *all* acts of retaliation are prohibited whereas others have limited the scope of protection to those acts of retaliation which constitute "ultimate employment actions." In reality, however, the courts have long concluded that Congress prohibited ***only*** "adverse employment actions." It is just that some courts have opted for a case-by-case approach for deciding what constitutes an adverse employment action, whereas the Fifth Circuit has made an effort to define that term by holding that it means "ultimate employment actions," such as discharge,[4] constructive discharge,[5] withdrawal of a reinstatement offer,[6] refusal to rehire,[7] wrongful denial of promotion,[8] denial of severance benefits[9] or a decrease in compensation.

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[4] See also *Brady v. Thurston Motor Lines*, 726 F.2d 136, 141 (4th Cir.), *cert. denied*, 469 U.S. 827 (1984).

[5] See also *West v. Marion Merrell Dow, Inc.*, 54 F.3d 493, 497 (8th Cir. 1995) and *Holsey v. Armour & Co.* 743 F.2d 199, 209 (4th Cir. 1984), *cert. denied*, 470 U.S. 1028 (1985).

[6] See also *EEOC v. Ohio Edison Co.*, 7 F.3d 541, 546 (6th Cir. 1993).

[7] See also *East v. Romine, Inc.*, 518 F.2d 332, 340 (5th Cir. 1975), *reversed on other grounds, Burdine v. Texas Dept. of Community Affairs*, 647 F.2d 513 (5th Cir. 1981) and *Waddell v. Small Tube Products, Inc.*, 799 F.2d 69, 73-4 (3rd Cir. 1986).

[8] See also *Brady v. Thurston Motor Lines*, 726 F.2d 136, 141-2 (4th Cir.), *cert. denied*, 469 U.S. 827 (1984) and *Bickel v. Burkhart*, 632 F.2d 1251, 1255-6 (5th Cir. 1980).

[9] See also *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1089-90 (5th Cir. 1987) (construing parallel provision under the ADEA).

Since ***all*** circuits agree that ultimate employment actions are prohibited, there is no conflict insofar as that aspect of this rule is concerned. Rather, the disagreement lies in terms of conduct, such as that alleged in this case, involving (if true, which is denied) petty, unprofessional behavior toward a colleague.[10] Under the approach adopted by the Fifth Circuit, the answer is clear; the conduct is not actionable. Under the approach used by some other circuits, the answer is not so clear and, presumably, differs from judge-to-judge and case-to-case.[11]

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[10] See footnote 2, above. As noted, all of the individuals accused of having "retaliated" against petitioner vehemently deny having done so. In fact, the ***only*** evidence on these issues submitted to the court in connection with respondent's motion for summary judgment was that adduced by respondent, which established that none of this had occurred and that petitioner was a very sensitive individual who had misinterpreted these (and other) events.

[11] In his application, petitioner has suggested that the Fourth Circuit has followed the Fifth Circuit and, further, that the Seventh, Ninth and D.C. circuits have rejected the Fifth Circuit's analysis. Although this Court is probably not greatly influenced by how many courts are on each side, it should be noted that petitioner's analysis is not exactly accurate. LSU respectfully submits that the "line-up" at present is as follows: only the Eleventh and District of Columbia Circuits have clearly rejected the Fifth Circuit's standard. (And, since at least one D.C. Circuit judge has criticized that court's approach, it may only be a matter of time before the D.C. Circuit revisits its position. See *Tschappat v. Reich*, 957 F. Supp. 297, 299 (D. D.C. 1997).) The Second, Ninth and Tenth circuits have criticized cases which cited or relied upon *Mattern*. See *Richardson v. New York State Dept. of Correctional Services*, 180 F.3d 426 (2nd Cir. 1999); *Ray v. Henderson*, 217 F.3d 1234 (9th Cir. 2000); *Gunnell v. Utah Valley State College*, 152 F.3d 1253 (10th Cir. 1998) and *Jeffries v. State of Kansas*, 147 F.3d 1220 (10th Cir. 1998). Thus,

In any event, on the chance that this issue has, for some reason, now become ripe for consideration by this

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they should, perhaps, be considered aligned with the Eleventh and D.C. circuits. By contrast, the Third, Fourth, Seventh and Eighth circuits appear to use tests which are similar, if not identical, to that adopted by the Fifth Circuit. The remaining circuits have not specifically addressed this issue.

Although the "ultimate employment action" approach used by the Fifth Circuit is based upon a Fourth Circuit case, see *Page v. Bolger*, 645 F.2d 227, 233 (4th Cir. 1981) (en banc), *cert. denied*, 454 U.S. 892 (1981), the Fourth Circuit has not actually had an opportunity to squarely address this issue since the Fifth Circuit wrote *Mattern*. (That is, contrary to petitioner's assertion, the Fourth Circuit did not hold, in *Munday v. Waste Management of North America*, 126 F.3d 239 (4th Cir. 1997) that only ultimate employment actions are protected under the anti-retaliation provision. That case involved a settlement agreement which prohibited *any* retaliation.)

Similarly, petitioner's contention that the Seventh Circuit has rejected the approach adopted by the Fifth Circuit is inaccurate. In fact, its recent cases are consistent with the Fifth Circuit's standard. See *Smart v. Ball State University*, 89 F.3d 437, 441 (7th Cir. 1996); *Rabinovitz v. Pena*, 89 F.3d 482, 488 (7th Cir. 1996); *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996); *McDonnell v. Cisneros*, 84 F.3d 256, 258 (7th Cir. 1996) (noting tension in Seventh Circuit cases); *Flaherty v. Gas Research Inst.*, 31 F.3d 451, 456-7 (7th Cir. 1994) and *Crady v. Liberty National Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993) (construing parallel provision of ADEA).

And, although not mentioned by petitioner, the Eleventh Circuit has disagreed with the Fifth Circuit on this point. See *Wideman v. Wal-Mart Stores, Inc.*, 141 F.3d 1453 (11th Cir. 1998). Similarly, although not mentioned by petitioner, the Eighth Circuit appears to have joined the Fifth Circuit in concluding that only "ultimate employment actions" are covered by the anti-retaliation provision. See *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) (holding that "[w]hile the action

Court, it is appropriate to analyze the differences between these two approaches with a view to deciding whether one is so much better than the other that it ought to be imposed upon all circuits.

The approach advocated by petitioner herein clearly has some advantages. It is unquestionably appealing to consider the facts of each and every case to make sure that the right to be free of retaliation assured by the Civil Rights Act of 1964 is being fully protected. By contrast, the "bright line" approach adopted by the Fifth Circuit clearly leaves open the possibility, however slight, that someone whom Congress meant to protect will be left unprotected. This Court unquestionably has the power to decide which approach better serves the needs of those at risk of retaliation, including whether there are sufficient resources in the federal judiciary to engage in a case-by-case analysis of every claim of retaliation or whether a "bright line" approach which offers everyone – courts, employers and employees alike – guidance will work better. The real issue, then, is whether this is a "problem" worthy of this Court's time.

It is well-known that employers almost always want to know, in advance, precisely which actions are allowed and which are not. As the Eleventh Circuit pointed out:

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complained of may have had a tangential effect on her employment, it did not rise to the level of an ultimate employment decision intended to be actionable under Title VII") and *Montandon v. Farmland Industries, Inc.* 116 F.3d 355, 359 (8th Cir. 1997) (holding that a transfer and negative performance evaluation did not constitute retaliation).

> Although we have interpreted Title VII to mean that an employer cannot retaliate by taking an 'adverse employment action' against an employee . . . we have never defined what this general phrase means. [As a result,] a reasonable employer has no way of knowing for certain whether acts short of firing, demoting, or refusing to hire an employee could violate Title VII['s anti-retaliation provision].

Wu v. Thomas, 996 F.2d 271, 274 (11th Cir. 1993), *cert. denied*, 511 U.S. 1033 (1994). Similarly, employees will also benefit by knowing, in advance, what costs they can be expected to have to bear if they file a claim of discrimination or otherwise engage in protected activity. Indeed, it is possible that the "bright line" approach adopted by the Fifth Circuit benefits *employees* more than it does *employers* because it destroys any misconception that an employee might otherwise have about what can happen to him if he files a charge of discrimination. It is plainly unfair to employees to have only a nebulous standard which does not alert them in advance of the risks they are about to take. And, finally, the courts will clearly benefit from a bright line standard which eliminates the need for a time-consuming, painstakingly-slow, case-by-case analysis of the facts in each case of this type.

Even though the possibility exists, under the approach adopted by the Fifth Circuit, that someone, somewhere could be wrongly deprived of his right to be free of retaliation, LSU respectfully submits that the petitioner in this case is not at such a risk. Even if his claim is considered under the case-by-case approach which he prefers, it would still, in all likelihood, be rejected since

all courts have agreed that minor insults do not constitute retaliation.

Moreover, this petitioner cannot prove all of the elements of his case, even if this standard is changed. That is, as this Court is well aware, to establish a claim of retaliation, a plaintiff must show that he was: (1) engaged in protected activity; (2) that he was subjected to an adverse employment action; and (3) that there is a causal connection between the two. Thus, even if this Court remands this matter for further proceedings, petitioner must show that there is a causal link between his filing of an EEOC charge and the "adverse employment actions" which he suffered. Since petitioner submitted ***no*** such evidence in response to respondent's motion for summary judgment (and he was also unable to carry that aspect of his burden of proof in connection with his underlying discrimination claim), it is unlikely, to say the least, that he can produce any such evidence now, even if he is given a second chance to do so.

Petitioner has made no claim that the approach taken by the Fifth Circuit is inconsistent with any decision of this Court. LSU agrees and respectfully submits that the Fifth Circuit's approach is actually consistent with the results reached in three recent cases involving somewhat similar circumstances. As such, if this Court were to take up this issue, it would, in all likelihood, simply accredit the approach now used by the Fifth Circuit which is, as demonstrated above, fast becoming the rule anyway. Thus, again, the question is really whether a grant of certiorari in this case is the best use of this Court's time and resources.

In *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L.Ed.2d 633 (1998), this Court added definition to the phrase "tangible employment actions" in the context of sexual harassment claims, by holding that where a tangible job detriment occurs, the employer will be liable for supervisory sexual harassment. The definition of "tangible employment action" in this context is "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. 118 S. Ct. at page 2268. That is, of course, the same approach taken by the Fifth Circuit for retaliation claims and reflects the same preference for clarity and predictability.

Similarly, the Fifth Circuit's decision is in line with this Court's decision in *Robinson v. Shell Oil Company*, 519 U.S. 337, 117 S. Ct. 843, 136 L.Ed.2d 808 (1997). In that case, this Court resolved a split among the circuits and extended Title VII's anti-retaliation provision to cover former employees. The case involved an employee who, shortly after being fired by Shell, filed an EEOC charge. While that claim was pending, the employee applied for a job with another company, which contacted Shell for an employment reference. As a result of the reference given, the other company declined to hire the plaintiff. At first glance, this would appear to be inconsistent with *Mattern v. Eastman Kodak*, in that supplying a negative reference does not appear to be an "ultimate employment action." However, blacklisting a former employee is considered an ultimate employment action when it results in a decision not to hire that person (as opposed to a negative job

evaluation which has no immediate effect upon employment conditions). See *Page v. Bolger*, 645 F.2d 227 (4th Cir. 1981) (en banc), *cert. denied*, 454 U.S. 892 (1981).

Finally, there is nothing in the Fifth Circuit's decision which conflicts with this Court's interpretation of the extent of protection enjoyed by government employees who do not support the political party in power. In *Elrod v. Burns*, 427 U.S. 347, 96 S. Ct. 2673, 49 L.Ed.2d 547 (1976) and *Branti v. Finkel*, 445 U.S. 507, 100 S. Ct. 1287, 63 L.Ed.2d 574 (1980), this Court ruled that government officials could not lawfully discharge or threaten to discharge public employees solely for not supporting the political party in power (unless party affiliation was an appropriate prerequisite for the position involved). Then, in *Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S. Ct. 2729, 111 L.Ed.2d 52 (1990), this Court extended that protection to cover promotions, transfers, recalls, and hiring decisions. Although *Rutan* was, of course, based on the First Amendment, and not Title VII, the similarity in results is striking.

If this Court decides that this is a good time to take up this issue, after declining to do so in the past, LSU respectfully submits that the approach used by the Fifth Circuit should be adopted by this Court.

***Assignment of Error Number 2*: The Court of Appeals Erred By Granting Defendant's Summary Judgment In This Title VII Discrimination Case**

Petitioner next contends that the courts below erred by granting respondent's motion for summary judgment. He complains that the courts improperly "weighed the

evidence" and, ironically, at the same time grouses that they failed to give appropriate consideration to his qualifications relative to those of the candidate originally selected. He further contends that the courts wrongly concluded that LSU satisfied its burden of articulating a legitimate, nondiscriminatory reason (for the failure to promote petitioner to the position of department chairman) and that he failed to make a sufficient showing of pretext. Lastly, he argues that this Court has never sanctioned the standard used by the Fifth Circuit to evaluate disparities in qualifications of job applicants.

The gist of petitioner's complaint in this assignment of error is that the courts below failed to find him more qualified, or at least as qualified, as the candidate who was originally selected for the open position. While his disappointment in the factual findings made herein is certainly understandable, it does not make this case certworthy. See Rule 10 of the Rules of the Supreme Court of the United States. Moreover, the lack of merit of petitioner's assertions should be obvious from reading the decisions of the magistrate judge, district court and court of appeal. Petitioner submitted no evidence whatsoever – direct or indirect – to prove that his national origin was *the* – or even *a* – factor in the selection decision. The dismissal of petitioner's claims by summary judgment for failure to prove an essential element of his case was entirely appropriate in this matter.

Nor was the wrong standard applied for comparing petitioner's qualifications to those of the candidate who was selected for this position. Petitioner's argument overlooks the fact that it is not the role of the courts to second guess employers' hiring decisions, especially as to which

candidate was best qualified or best suited for a particular job. In fact, this Court has admonished the courts to abstain from becoming "personnel managers" and warned them of the dangers of deciding which business practices are best. See *Furnco Construction Corporation v. Waters*, 438 U.S. 567, 98 S. Ct. 2943, 57 L.Ed.2d 957 (1978). In line therewith, the Fifth Circuit has held that mere disparities in qualifications are not enough, in and of themselves, to demonstrate discriminatory intent unless those disparities "are so apparent as virtually to jump off the page and slap you in the face." See *Deines v. Texas Dep't Of Protective and Regulatory Services*, 164 F.3d 277 (5th Cir. 1999); *Scott v. University of Mississippi*, 148 F.3d 493, 508 (5th Cir. 1998) abrogated on other grounds by *Kimel v. Florida Bd. Of Regents*, 528 U.S. 62, 120 S. Ct. 631, 145 L.Ed.2d 522 (2000); *EEOC v. Louisiana Office of Community Services*, 47 F.3d 1438, 1445 (5th Cir. 1995) and *Odom v. Frank*, 3 F.3d 839, 847 (5th Cir. 1993).

This rule is based not only on the inherent difficulty of evaluating qualifications, but also upon the notion that, in Title VII cases, "we do not try in court the validity of [an employer's] good faith belief as to [one] employee's competence [in comparison to another]." *Mayberry v. Vought Aircraft Co.*, 55 F.3d 1086, 1091 (5th Cir. 1995). Thus, whether "the employer's decision was the correct one, or the fair one, or the best one is not a question within the jury's province to decide. The single issue for the trier of fact is whether the employer's selection of a particular applicant over the plaintiff was motivated by discrimination." *Deines, supra*, 164 F.3d at 280.

Although petitioner has not suggested that there is a conflict in the circuits on this point, it should be noted

that the courts of this country appear to be in complete agreement that it is not their place to sit as a "super-personnel department."[12] LSU respectfully submits that the approach taken is not only a correct interpretation of the Civil Rights Act of 1964, but, from a practical standpoint, the only one which could have been taken. As such, there is no reason for this Court to reconsider that standard or to review its application in this case.

Petitioner herein has also failed to identify what "other" standard would be more appropriate to use and he has failed to explain how that "other" standard would have made a difference to the outcome of his case. As previously noted, petitioner failed to submit any evidence, whether direct or circumstantial, which shows or even tends to suggest that he was not selected for the position of department chairman because of his national origin.

All five of the judges below who examined petitioner's claims agreed that he lacks the evidence necessary to proceed to trial. There is simply no reason for this Court to conclude otherwise.

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[12] See, e.g., *Parcinski v. Outlet Co.*, 673 F.2d 34, 37 (2nd Cir. 1982), *cert. denied*, 459 U.S. 1103 (1983) (ADEA case); *Smart v. Ball State University*, 89 F.3d 437, 441 (7th Cir. 1996); *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996); *Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359, 1365 (7th Cir. 1988); *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986); *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557, 560 (7th Cir. 1987), *cert. denied*, 484 U.S. 977 (1987); *Kephart v. Institute of Gas Tech.*, 630 F.2d 1217, 1223 (7th Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); *Hutson v. McDonnell Douglas Corp.*, 63 F.3d 771, 781 (8th Cir. 1995); *Elrod v. Sears, Roebuck & Co.*, 939 F.2d 1466, 1470 (11th Cir. 1991).

CONCLUSION

For the foregoing reasons, LSU respectfully requests that this Honorable Court deny Manjit S. Kang's petition for writ of certiorari.

Respectfully submitted,

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